IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRI. APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 921 OF 1988

The State of Maharashtra ... Appellant
(Ori. Complainant)

V/s

1. Dattu @ Dattatraya Kana Vaskar
2. Sunil Dattatraya Vaskar
3. Rohidas Dattatraya Vaskar
4. Ganesh Govind Patil
All residents of -
Manghar, Tal. Panvel,
Dist. Raigad. ... Respondents
(Ori. Accd.Nos.1 to 4)

Mr. B.H. Mehta, A.P.P. for the appellant.

Mr. P.P.Hudlikar with C.R.Sonawane for the Respondent Nos.1 to 3.

ALONGWITH

CRIMINAL REVN. APPLICATION NO. 316 OF 1988

Kishor Janu Patil,
At Village Manghar,
Tal. Panvel, Dist. Raigad. ... Applicant.

V/s

1. Dattu @ Dattatraya Kana Vaskar
2. Sunil Dattatray Vaskar
3. Rohidas Dattatraya Vaskar
4. Ganesh Govind Patil
All residents of Manghar,
Tal. Panvel, Dist. Raigad.

5. The State of Maharashtra. ... Respondents

Mr. K.N. Kore for the applicant.

Mr. P.P. Hudlikar with C.R. Sonawane for Respondent Nos. 1 to 3.

Mr. B.H. Mehta, A.P.P. for the Respondent No.5 State.

CORAM: R.M.S. KHANDEPARKAR & P.V. KAKADE, JJ.

DATED: 4TH MAY, 2005.

ORAL JUDGMENT (Per Kakade, J.):

1. The State has preferred this appeal against the judgment and order dated 11.7.1988 passed by the Sessions Judge, Raigad, Alibag acquitting all the four accused persons of the offences punishable under Sections 302 and 307 read with 34 of the I.P.C. alongwith offence under Sec. 25(1)(a) of the Indian Arms Act.

The Criminal Revision application is filed by the original complainant against the same judgment of acquittal and, therefore, both the proceedings are being disposed of by this common judgment.

2. At this juncture, it may be noted that accused Nos. 1 & 4 have since died vide death certificates brought on record and, therefore, the appeal abates against them and is being prosecuted only against accused Nos. 2 &

3.

3. The prosecution case in a nutshell is that, on 26.10.1986, deceased Janu was standing in the courtyard of his house and just opposite to his house, there is the house of accused Nos.1 to 3. Accused No.1 is the father of accused Nos.2 & 3 while accused No.4 is a stranger to the family of accused Nos. 1 to 3. All the accused persons were standing in the gallery of their house in front of the courtyard of the house of deceased Janu and they started shooting at the deceased at about 4 p.m. At the same time, PW-3 Atmaram Patil who had just come from Panvel, was standing near the foot-steps of his house. He called his father Janu towards him when the incident of firing at the hands of accused Nos. 1 to 4 took place as a result of which deceased sustained pellet injuries and fell down. PW-3 Atmaram then proceeded further to give him help but he also came to suffer fire arm injury from guns of accused Nos. 1 to 4. Other witnesses who were then present in the courtyard also suffered injuries as there was incessant firing undertaken by accused Nos. 1 to 4 by standing in the gallery.

The complainant Keshav was also present in the courtyard

when the incident took place and he was also likewise injured. Deceased Janu had also suffered injury on his private part as well as on the other parts of his body. He was, therefore, lifted to the nearby cattle-shed and the other injured Atmaram was lifted to his house. The complainant thereafter proceeded to Kundewahal where his brother-in-law stays and taking his cart he came to village Pargaon. Thereafter he proceeded to Panvel police station from Pargaon village and the cart was sent back to the village. The complaint came to be lodged in the police station vide Exh.15 by witness Keshav. The complainant being himself injured, was then sent to the hospital for treatment. Likewise all the injured were also admitted to the hospital.

Complaint at Exh.15 came to be recorded by P.S.I. Latif on 26.10.1986 and was referred to the police station for registration of the offences alongwith the necessary report vide Exh.62. The offence was registered against the accused persons at C.R.No.575 of 1986 under Sections 302 and 307 read with 34 of the I.P.C. and also under Sec. 25 (1)(a) of the Indian Arms Act.

The investigation commenced in which course the dead body was sent for post-mortem examination alongwith the

report. Then P.S.I. Mansingh Pawar then proceeded to village Manghar which is the scene of offence alongwith police party. He took search of the house of accused No.1 in the presence of panchas and seized 4 empty cartridges as per panchnama. Thereafter he prepared panchnama of the scene of offence. Later on recording of statements of Rajendra Patil, Chhaya Atmaram Patil, Radhabai Patil, etc. was done and he also recorded the supplimentary statement of the complainant on that very day. The accused could not be traced on that day because they were reported to be absconding. Then on 27.10.1987 search of the house of accused No.1 was again taken under the panchnama. Also on that day, the clothes of injured witnesses were seized under panchnama. Statement of Sudam Maruti etc. were recorded and thereafter medical certificates were also obtained as can be seen from the record. However, the accused were not traced till that day. P.S.I. Thakur, however, produced the clothes of the deceased and they were taken into custody as per panchnama. On 28.10.1986 there was further recording of statements of Raghunath Jitekar and others. Search of the accused was going on in the meantime. On 29.10.1986 statements of several other witnesses were recorded. On 30.10.1986 medical certificates in respect of the injuries sustained by the

injured were received. Various police stations were also informed regarding absconding accused persons. However, on 11.11.1986 two accused persons including accused No.1 came to be apprehended from their hiding place. On 12.11.1986 there was discovery of the gun at the instance of accused No.1 from the well pointed out by him and the weapon was recovered from the well vide memorandum of panchnama Exh.66. A report was then submitted to the superior officer for cancellation of the licence for the gun. Thereafter, the muddemal was sent to the Chemical Analyser for examination and report of the C.A. was received in due course including the report of the forensic experts to whom the gun was sent alongwith the recovered spent pellets and cartridges including the empty cartridges. On completion of the investigation, the chargesheet was sent to the Court of law.

4. The learned Magistrate committed the case to the Court of Sessions. The learned Sessions Judge framed charges against the accused persons for the aforesaid offences to which they pleaded not guilty. By and large, the defence of the accused, as revealed from the cross-examination as well as statement under Sec. 313 of the Cr.P.C. is to the effect that on the day of

Dasara, complainant Kishor and witness Kamali were seen by Walya - servant of accused No.1, in compromising position. Therefore, witness Atmaram called village panchayat meeting and in that meeting Walya narrated the whole incident and as there was hue and cry in the meeting, the meeting was dispersed. Thereafter, in order to teach a lesson, witness Kishor and other prosecution witnesses decided to assault Walya. Hence on 26.10.1986 at about noon time they tried to assault him and hence entered the house of the accused with whom Walya was working. The accused persons were not in the house, therefore, the witnesses pelted stones at the house of the accused. Thereafter, Walya went away and Kishor took the gun of accused No.1 which was lying in the house of the accused. At that time, Kishor and others followed Walya and fired at the house of Janu suspecting that Walya had gone there and in the said firing Janu and others sustained injuries and ultimately Janu died.

The learned Trial Judge proceeded to record the evidence of the prosecution wherein as many as 8 eye-witnesses were examined besides leading circumstantial evidence on record. However, the learned Trial Judge found the prosecution evidence as not reliable and defence theory

was held to be not only credible but also reasonably established and as such all the accused persons came to be acquitted of all the charges levelled against them. Hence the appeal.

5. We have heard the learned A.P.P. for the State and Mr. Hudlikar for the respondents at length with whose help we have also critically perused the entire evidence on record.

6. At the outset, it may be noted that there is no doubt whatseover that the deceased died homicidal death due to fire arm injuries. It is also not in dispute that the injured persons also suffered fire arm injuries in the course of firing from gun/guns. The perusal of the medical officer’s note Exh.35 shows that there were as many as 11 punctured external injuries on the body of the deceased and the medical officer opined that those were sufficient in the ordinary course of nature to cause death of deceased Janu and the death was also instantaneous.

As noted earlier, there are as many as 8 eye-witnesses out of which 6 are family members of the deceased including 3 injured persons, besides two independent

eye-witnesses to the incident. PW-2 Kishor, the complainant is son of deceased Janu. It has come in his evidence that he has two brothers by name, Laxman and Atmaram. Brother Laxman was residing with father and brother Atmaram was residing separately. According to him, the incident took place on 26.10.1986 at about 4.00 p.m. when his brother Atmaram had just arrived from Panvel on motor-cycle which was parked behind his house and then went to the courtyard where his father deceased Janu was standing. He made signal to his father to come towards him but exactly at that juncture accused Nos. 1 to 4 appeared in the gallery of their house and started firing from there. As a result of the firing, his father fell down in the pool of blood oozing from his body. As Atmaram proceeded to help his father, he too was shot at by gun fire by accused No.2. Accused Nos. 2 & 3 were also there firing at the group of persons in the courtyard of the deceased. Atmaram received pellet injury and he also fall on the ground. The complainant, his mother, sister and brother's wife Chhaya also received injuries on their person as a result of this incessant firing.

Somehow, during the shower of pellets fired from the guns of accused Nos. 1 to 4, the deceased was lifted to

the nearby cattle-shed and PW Atmaram was taken to his house. Deceased Janu, however, died instantaneously as a result of the injuries sustained by him and Atmaram himself was rendered unconscious. The complainant, however, realizing the gravity of the situation proceeded to the village Kundewahal where his brother-in-law lives and obtained bullock cart from him and went to Panvel and the same was sent to the village to fetch injured persons. In the meantime, the complaint came to be lodged at the police station vide Exh.15 and the police were also prompt enough to send him to the medical officer for treatment to his injuries. Rest of the injured were also attended to at police station in due course of time and they also came to be examined by the medical officer for the injuries sustained by them.

PW-3 Atmaram has corroborated the evidence of the complainant who has stated that he had just arrived from Panvel on his motor-cycle at which time he came to the footstep in front of the **Ota** (platform) of his house. His father Janu was near the footsteps of the **Ota** of the house in standing position. His mother and sister were there. Complainant Kishor was near the cattle shed. This witness came to his father and asked him to come

near him. Deceased Janu was about to come towards him, accused No.1 fired shot from his gallery. Then accused Nos. 1 to 4 who were standing there also started firing upon Janu and persons who were present in his courtyard. It has come in his evidence that the gallery of the house of the accused No.1 is visible from his courtyard which is at the distance of about 50 to 60 feet. His father's house faces to northern side and there is a small **Padvi** in front of the said house of his father. Atmaram has given details about the firing which took place at the distance of the accused persons and resulted in infliction of injuries upon them including Janu who succumbed to the injury intestaneously. This version is again corroborated by PW-4 Gangubai - daughter of deceased Janu, PW-5 Rajendra, PW-6 Chhaya - wife of witness Atmaram, PW-7 Radhabai - widow of deceased Janu and mother of other witnesses including the complainant and Atmaram, PW-8 Mahadeo and PW-9 Kanha. Out of these witnesses, PW-5 Rajendra, PW-8 Mahadeo and PW-9 Kanha are neighbours of deceased Janu, whereas other witnesses are his family members. On perusal of their entire evidence, it is found that they have corroborated the testimony of complainant and other witnesses on all material points. It is also pertinent to note that the complaint came to be lodged at about

5.00 p.m. on the same day i.e. on 26.10.1986 i.e. about one hour after the incident. The contents of the F.I.R. fully corroborate the version given not only by the complainant Kishor but also by all other eye-witnesses amongst whom there are actually injured witnesses. It is also pertinent to note that the F.I.R. was lodged without any loss of time and, therefore, there is absolutely no reason to disbelieve the truthfulness of the version made in the F.I.R. It is also to be noted that there was absolutely no reason for complainant Kishor to manipulate the facts in order to falsely implicate the accused persons during the period between the incident and the filing of the F.I.R. This is obviously so and reflected from the evidence because due to incessant firing Janu was lying dead and other witnesses i.e. family members of complainant Kishor were lying injured on the spot when he rushed to the police station. It may also be noted that Kishor himself also was injured, which aspect nullifies the defence theory that Kishor fired at the relevant time.

7. It was urged on behalf of the respondents that the eye-witnesses injured persons are family members of the deceased and, therefore, interested persons and thus cannot be believed in order to bring home the guilt.

However, it is to be noted that there are as many as three eye-witnesses who are independent and have no reason to implicate the accused persons falsely. PW-5 Rajendra has stated that his house is located in close vicinity of the injured as well as accused persons and when he was on the first floor of the house at about 3.45 p.m. to 4.00 p.m., his attention was attracted to the gallery of accused No.1 where all the four accused were standing armed with guns and at that time, accused No.1 fired towards the house of Atmaram when he fired for the second time. However, accused continued to fire with the gun. Deceased janu and Atmaram were found to be lying on the ground due to bullet injuries. Kishor, Chhaya, Radhabai and others were also were seen lifting deceased Janu and they were also injured when accused persons continued to fire upon them. Similarly, PW-8 Mahadeo had stated that, on the day of the incident he had gone to the house of Atmaram at about 4.00 p.m. when Atmaram came on motor-cycle and was standing on the footsteps of his house and called his father who was standing in the courtyard. At that time, accused No.1 fired at him and Janu fell down. Thereafter accused No.3 fired at Atmaram who also fell down. Then accused persons started firing on the family members of deceased Janu as a result of which they sustained injuries. PW-9

Kanha gave similar version of the incident. Evidently, he is also neighbour of the parties involved in the incident and he has stated that he witnessed the incident when accused Nos. 1 to 4 fired at Janu and his family members as a result of which Janu died.

8. At this juncture, it must be noted that all the said eye-witnesses were subjected to searching cross-examination but no material contradictions or discrepancies have occurred in their version of the incident. It is also not brought on record as to why as many as 3 independent witnesses should testify falsely against the accused persons who were influential members of the village. Accused No.1 was Sarpanch of the village, accused Nos. 2 and 3 are his sons and accused No.4 was a stranger but known to the accused persons.

Mr. Hudlikar, learned counsel for the respondents vehemently urged that the witnesses who were related to the deceased, though were injured, were interested witnesses and, therefore, their ocular testimony cannot be relied upon. In this regard we must note that, even if witness is related to the deceased, there is no reason to discard his evidence if he is reliable and trustworthy. What is required is a cautious and careful

approach in appreciating the evidence because a part of the evidence might be tainted owing to the relationship and the witnesses might be exaggerating the facts. In such an event, the Court should appreciate the evidence in the light of other evidence on record which may either oral or documentary. In the present case, as we have seen earlier, merely because the witnesses are relatives of the deceased and other witnesses are known to the deceased, then it cannot be the ground per se to discard the testimonies of such witnesses if those are supproted by other circumstantial evidence brought on record. In this case, not only the relative witnesses have implicated the accused persons squarely but they are also injured in the course of incessant firing at the hands of accused Nos. 1 to 4 in which course deceased Janu lost his life. Moreover, there is no reason reflected from the entire record as to why three independent witnesses should be disbelieved when they testified to the effect that all the accused persons fired their guns at Janu and other witnesses as a result of which Janu was killed on the spot and others were injured. In view of this aspect and the fact that the ocular testimonies of these witnessess are supported by the circumstantial evidence, there is absolutely no reason to doubt the veracity and credibility of the

evidence of the eye-witnesses in this case.

9. The ocular testimonies are further strengthened by the medical evidence on record. As we have noted earlier, there were as many as 11 external punctured wounds on the person of deceased Janu and all were evidently bullet injuries. Those were as follows:-

(1) Penetrated wound right scrotum laterally 1/2 cm. x 1/2 cm.

(2) Penetrated wound left scrotum laterally 1 cm. x 1 cm.

(3) Penetrated wound on right thigh anteriorally U/3 1/2 cm. x 1/2 cm.

(4) Penetrated wound on left thigh laterally two U/3 1/2 cm. x 1/2 cm. each.

(5) Penetrated wound right laterally, middle third thigh one 1/2 cm. x 1/2 cm.

(6) Penetrated wound over illiac posteriorly in most exillary lobe one 1/2 cm. x 1/c cm.

(7) Penetrated wound right illiac crest post. Two in number in mid scapular line. Each of 1/2 cm. x 1/2 cm. size.

(8) Penetrated wound over right gluteal region two in number each of 1/2 cm. x 1/2 cm. size.

(9) Penetrated wound over left bluteal region one inmiddle area 1/2 cm. x 1/2 cm. size.

(10) Penetrated wound over right thigh posteriorly U/3 1/2 cm. x 1/2 cm. size.

(11) Penetrated wound over left lumposcasal area just above illiac creast one 1/2 cm. x 1/2 cm. size.

Similarly, it would be worthwhile to refer to the injuries sustained by each of the injured at this stage. Witness complainant Kishor Janu Patil suffered following injuries:

(1) Punctured wound just below elbow joint posteriorly size 1/4 cm. x 1/4 cm.

(2) Punctured wound on the left forearm M/3 exit

wound size 1/2 cm. x 1/2 cm.

(3) Fracture of radius left forearm M/3 exit wound. Crack.

Witness Tukaram Gajanan Patil sustained the following injuries:

(1) Punctured wound left side neck base. Size 1/2 cm. x 1/2 cm.

(2) Punctured wound left shoulder frontal area. Two in number each of 1/2 cm. x 1/2 cm.

(3) Punctured wound just above illiac crest posteriorly. Size 1/2 cm. x 1/2 cm.

(4) Abrasion on right maxills. Size 1 cm. x 1 cm.

Witness Radhabai Janu Patil sustained following injuries:

(1) Punctured wound, medialy just below left ankle. Size 1/2 cm. x 1/2 cm.

Witness Smt. Chhaya Atmaram Patil sustained following injuries:

(1) Punctured wound on left thigh, posteriorly, size 1/4 cm. x 1/4 cm.

(2) Punctured wound on left thigh, posteriorly, size 1/4 cm. x 1/4 cm.

(3) Punctured wound on left thigh, posteriorly, size 1/4 cm. x 1/4 cm.

Witness Atmaram Janu Patil sustained following injuries:-

(1) Punctured wound on left chest front, just below clavicle, size 1 cm. x 1 cm.

(2) Punctured wound in line of left breast. Size 1/2 cm. x 1/2 cm.

(3) Punctured wound over left breast. Size 1/2 cm. x 1/2 cm.

(4) Punctured wound on right side neck base. Size 1 cm. x 1/2 cm.

(5) Punctured wound on right arm L/3, size 1/2 cm. x 1/2 cm.

All the injuries on the persons of deceased and injured are seen to be punctured wounds evidently caused by pellets fired from the fire arm. The medical certificates Exhs. 28 to 30, 32 and 33 coupled with the testimony of the medical officer are in total corroboration with the eye witness account to show that the injuries were inflicted at about 4.00 p.m. and those injuries were bullet wounds suffered at the relevant time.

Therefore, the medical evidence is clear enough to show that not only the injuries on the person of deceased but also those on the person of injured persons were pellet injuries having caused due to firing made by accused Nos. 1 to 4 at the relevant time and place. The medical officer has further stated that he found 5 pellets and extracted those from the body of deceased Janu. According to him, the death was due to cardio respiratory failure secondary to haemorphagic shock due to rupture of multiple vessels secondary to fire arm injuries. He has further stated regarding injuries of the deceased Janu that there were 10 entry wounds and only one injury was exit wound. Out of 10 entry wounds, 8 are on the left side and only 2 were on the

right side and all the entry wounds could be caused due to fire arm. Injury to scrotum, according to the medical officer was possible by the gun hit at the angle of 45 degrees. The exit wound is also on the scrotum. This is the position so far as the medical evidence is concerned.

10. This brings us to the evidence regarding motive attributed to the accused persons in this case. Initially it must be noted that the evidence regarding existence of motive itself need not be established if the direct evidence is available on record. However, in this case, the element of motive is fully established which attributes the overtact to the accused persons and confirms positive corroboration to the other evidence on record.

The accused No.1 was evidently Sarpanch of the village and accused Nos. 2 and 3 are his sons, whereas accused No.4 was accomplice. It has come in the evidence of PW-10 Raghunath, who is one of the panchas of the village that, there is group of 14 villages and if any quarrel took place in 14 villages, then they use to call Panchayat of 14 villages. On 25.10.1986, panchas of 14 villages had collected at the village temple at about 2.00 to 3.00 p.m. The meeting was in respect of the incident of one Walya, servant of accused No.1. It is alleged that Walya had

entered the house of one woman in the night time and caught-hold of her hand and when she raised alarm, he ran away. The incident was informed to the elders of the village and hence meeting was called. Walya was called in the meeting and he confessed to his guilt to the meeting that accused No.1 brought Walya to his house and accused No.1 told the meeting that he had brought Walya to his house as he apprehended that Walya would be beaten by the villagers. Therefore, the meeting also held accused No.1 responsible for abetting the commission of the offence and imposed fine of Rs.101/- on Walya. The decision of the meeting, at that time, was accepted by all the concerned persons and panchas asked apology from accused No.1 but the commotion took place on that point and meeting dispersed. This evidence is again supported by none else than PW-12 Kamlabai whose modesty was outraged by servant of accused No.1 on the earlier night. She has categorically stated that in the night time Walya had entered the house and put his foot on my hand and thereafter caught her hand and ran away. She saw him in the moonlight. This incident was narrated by Kamlabai to her mother and her mother had told about the incident to PW Atmaram as the mother used to work at his place. So also he was panch of the village. Atmaram told Kamlabai not to proceed further and the matter would be settled in village meeting. Accordingly, the

meeting was held, wherein Kamlabai was also asked about the incident and she narrated the incident implicating Walya. Walya also conferred to the incident though however the matter was not settled on that day. This aspect of evidence clearly attributes the motive to accused persons. It is established that Walya was servant of accused No.1 and had outraged the modesty of witness Kamlabai and, therefore, village meeting took place and imposed fine on Walya and also asked to accused No.1 to apologise for harbouring Walya in his place as Walya was his servant. This fact was not liked by the accused No.1 which resulted in animosity in the mind of accused No.1 against the victims because Atmaram was also one of the panchas of the village who had actively participated in the meeting which took decision against accused No.1. In our considered view,. this element of motive, considering the fact that accused No.1 was Sarpanch of the village, was sufficient to enrage him as his prestige in the village was lowered. Therefore, we are of the view that prosecution evidence regarding motive is totally acceptable under the circumstances especially when witness Raghunath, the village panch and witness Kamlabai are seen to be trustworthy and have narrated the incident regarding earlier outrage of modesty of Kamalabai and subsequent village meeting in the manner in which those did take

place. The fact that mother of Kamlabai is working with injured witness Atmaram cannot be used in order to doubt the veracity of these two witnesses because the circumstances on record have established all these elements which are in support of the testimony of both those witnesses and hence we conclude that the prosecution has proved the element of motive against the accused persons.

11. Then we come to the circumstantial evidence in the form of recovery of the weapon of offence. In this regard, it must be noted that, it is the case of the prosecution that accused No.1 had thrown his 12 bore double barrel gun in a well in the field within the limits of Dapoli village while running away and it was recovered at his instance. Accordingly, the memorandum of panchnama was prepared vide Exh.66 and accused No.1 led police and panchas to the said well wherefrom the gun before the Court was recovered and it was seized under panchnama Exh.66-A. The investigating Officer PW-15 P.I. Pawar has testified to the effect that on 12.11.1986 accused No.1 made statement before him that he would produce the gun which he had thrown in the well and accordingly the recovery took place as contemplated under Sec. 27 of the Indian Evidence Act. Eventually, the said gun was also sent to the Chemical Analyzer, Mumbai, for expert examination alongwith the pellets recovered from

the scene of incident as well as from the body of the deceased and injured persons. In this regard, it must be noted that no panch witnesses came to be examined, however, strangely enough, no specific cross-examination was made of the investigating officer by the defence in order to suggest that no recovery as alleged by the prosecution was made at the said time and place. In other words, the evidence regarding recovery panchnama is not seriously challenged. At the same time, cross-examination of the investigating officer on this point appears to be aimed to show that the gun which is produced before the Court was not the gun used in the commission of the offence itself. Be that as it may, we are inclined to accept the evidence of the investigating officer supported by the documents on record vide Exhs. 66 and 66-A to hold that the gun was recovered at the instance of the accused from a well wherein it was thrown by him. This is especially so, when the gun allegedly recovered and produced before the Court is found to be the gun from which some of the pellets recovered from the scene of incident were fired.

12. The ballastic expert’s certificate vide Exh.45 is admitted by the defence under Sec. 294 of Cr.P.C. and, therefore, no formal witness was examined to prove it formally on record and hence it can very well be read in

evidence. Evidently, the gun was sent to the forensic science laboratory, Mumbai, alongwith the cartridges and empties of pellets found on the scene of incident as per the procedure laid down in law. The report shows that Exh.5 were two deformed lead shots putting a phial labelled Janu Ganu Patil; Exh.6 contained three deformed lead shots put in a phial labelled Janu Ganu Patil, which shows that Exh.5 deformed lead shots were recovered from the body of the deceased at the time of the post-mortem examination as testified to by the medical officer which were forwarded accordingly to the chemical anlyzer. Exh.7 is one deformed lead shot obviously recovered from the wounds of witness Radhabai Janu Patil. The clothes worn by the deceased and witnesses were also sent for examination. The result of analysis shows that Exh.1 is a double barrel breech loading 12 bore hammerless shotgun of which right hand side barrel is in working order. Firing mechanism of the left barrel, however, as reported was defective. Traces of residue of fired ammunition - nitrite was detected in both the barrel washings. The 12 bore shot gun cartridges from laboratory, were successfully test fired from right barrel of Exh.1 gun. The expert has further noted as follows:-

> "The characteristic firing pin impressions on the 12 bore empties in Exhs. 3A2, 3A3, 3A4, 3A6, 3A7,

3B, 4A1, 4A4, 4A5, 4A6, 4A7, 4A8, 4A9, 4A10, 4A11, 4B4, 4B5, 4B6, 4B7 and 4B8 tally among themselves and broadly tally with those on the cartridges test fired from right barrel of Exh.1.

The characteristic firing pin impresson on Exh. 3A1, 3A5, 4A2, 4A3, 4A12, 4B1, 4B2 and 4B3 tally among themselves but do not tally with that on the cartridges test fired from right barrel of Exh.1 and also the firing pin impression on the caps of dismantled 12 bore shotgun cartridges obtained mechanically from the firing pin for the left barrel of the shotgun."

Further, it is observed that the presence of metallic lead in absence of blackening and powder residues around the encircled shot holes on rumal Exh.12, banian Exh.13 and Exh.14 are consistent with the firing of lead projectiles from beyond powder range of weapon. This aspect ultimately shows that not only the gun which is recovered at the instance of accused No.1 was used in the course of incident of firing, but there were more than one gun from which the pellets were fired which can be ascertained from the fact that noted exhibits are in respect of empty cartridges found in the gallery of the accused as well as from the

scene of incident which aspect is also testified to and supported by the evidence of the investigating officer. It was urged on behalf of the respondents that the gun which was produced before the Court did not cause death of Janu. In order to substantiate this statement, the learned counsel sought to put reliance on the ballastic expert's report which shows that characteristic firing pin impression on some of the empty pellets tallied among themselves but did not tally on the cartridges test fired from right barrel of the gun. In our considered view, this aspect of the evidence fortifies the prosecution case to the effect that though only one gun is recovered, there were three more guns used in the course of firing which clarifies the position that some of the characteristic pin firing impressions did not tally with some exhibits but did tally with those exhibits, by establishing not only the gun in question produced before the Court was used in the course of firing, but there were also other guns used, in the course of evidence which police failed to recover. It was further submitted on behalf of the respondents that, admittedly, there were two licenced guns in the village, one belonging to accused No.1 i.e. before the Court and the other belonging to one Gajanan Patil which was not seized by the police in order to ascertain whether that gun was used or not. However, the investigating officer has

clarified the position that the gun of Gajanan Patil was also seized and kept at the police station for couple of months in order to avoid any further tension in the village but was not sent for ballastic examination. This was obviously so because said Gajanan Patil was not concerned with the offence in question. The fact that merely one more gun is available in the village cannot allow us to jumpt to the conclusion that possibly the other gun also was used in the course of the incident in order to eliminate the use of gun of accused No.1 at the relevant time.

13. The C.A. report regarding examination of the other articles seized by the police in the course of investigation is also in favour of the prosecution which would not require elaborate discussion because the factum of firing and consequent injuries to the persons concerned is not denied by the defence at all.

14. Turning to the defence theory regarding which much ado appears to have been made by the learned Trial Judge, it must be noted that it was the defence of the accused persons that Walya - the servant of accused No.1, had witnessed Kishor and Kamlabai in compromising position and, therefore, Atmaram called village panchayat meeting and

there was commotion in the said meeting and hence the meeting dispersed. Then Kishor and Atmaram tried to assault Walya and, therefore, Walya entered the house of accused No.1 at which time Kishor brought the gun of Gajanan and handed it over to Tukaram and all of them went to Walya. Walya then ran away and finding that Walya is not in the house, the above persons pelted stones on the house of accused No.1. Then Kishor went inside the house. The accused was not there. Then Kishor took gun of accused No.1 and then Walya went inside the house of Janu due to fear and, therefore, Kishor started firing and in that firing Janu died and other persons got themselves injured. In our considered view, the basic defence of the respondents is to the effect that it was complainant Kishor and Kamlabai who were found in compromising position by Walya and, therefore, meeting was called by Atmaram. Firstly, this theory is negated by the evidence of two witnesses noted earlier including Kamlabai herself. Moreover, it is utterly impossible that Atmaram would call meeting of the village if his brother Kishor was found in compromising position with Kamlabai. On the other hand, in all probability he would try to suppress the matter. Thereafter it is also came to be suggested that Kishor entered the house of accused No.1, took gun of accused No.1 and fired and in the course of the said firing by Kishor,

his own father Janu and other family members were injured. In our considered view, this theory of defence is seen to be not only improper but actually preposterous. It must be noted that Kishor himself is injured. Moreover, this stand is obviously taken as a feeble attempt to explain firing from the gun of accused No.1. Be that as it may, we are not at all impressed by the defence theory which ultimately appears to have found favour with the learned Trial Judge without any substantial foundation and disregarding the positive prosecution evidence including ocular testimonies on record.

15. We have critically perused the judgment of the learned Trial Judge. He has sought to make much ado of stray statement made by the medical officer in the course of cross-examination to the effect that injury No.1 on deceased Janu could be caused by ground level fire at him. Earlier, in examination-in-chief, he has stated that such injuries were possible if the gun shots are hit on his body at a angle fo 45 degrees by standing in the gallery at the height and deceased is walking on the road. The answer was given in affirmative. The defence has tried to make out a case that Janu was sleeping at the relevant time when he was hit by the pellet and was not in standing position which the prosecution theory wants to establish. It is

further suggested that Janu must be lying down in the cattle-shed because much blood was found on the floor of the cattle shed and hence according to the defence it was suggested that Janu received injuries while he was in sleeping position in cattle shed and not standing in the courtyard as sought to be established by the prosecution. In this regard it must be noted that, not only the evidence of Atmaram but also that of other eye-witnesses established the fact that Janu was standing in the Courtyard and was actually proceeded towards Atmaram when Atmaram called him from the foot-steps in the courtyard when firing took place from the gallery i.e. from the height by accused Nos. 1 to 4. Moreover, the blood stains which appeard in the cattle-shed are also explained by the prosecution with the testimonies of the relevant witnesses to the effect that Janu fell down due to pellet wounds, the other witnesses and family members ran towards him and lifted him to the cattle shed in injured condition as a result of which blood stains appeared there. However, that does not mean that Janu suffered pillet injuries while sleeping in cattle-shed as sought to be suggested by the defence.

16. On the basis of this aspect, the learned Trial Judge has further sought to discard the ocular testimony of the witnesses on the basis of stray statement made by the

medical officer to the effect that injury No.1 of the deceased could occur while there was firing at ground level for which there is absolutely no specific support from the evidence on record. On this basis, the learned Trial Judge has further held that the medical evidence does not support the ocular evidence and, therefore, the entire ocular evidence is required to be discarded. In this regard, the principle of criminal jurisprudence is quite established and reiterated by the Apex court in the case of **Ramakant Rai v/s Madan Rai & ors., reported in 2004 Cri.L.J. 36,** wherein it is observed that,

> "It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantahm said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent

> consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

Bearing this principle of law in mind, it is seen that in the present case, the ocular testimonies are found to be not only credible but also trustworthy and, therefore, we have no hesitation to accept those versions putforth by the witnesses. Moreover, the medical evidence is also in accordance with the ocular testimonies but for the stray statement as noted earlier, that cannot negate the effect of independent ocular testimonies to hold that those are false because the medical officer has stated that injury No.1 could occur from ground level firing or deceased Janu was not on the spot because blood pool was found in cattle-shed, especially when those elements are satisfactorily explained by the prosecution witnesses.

Similarly, the only ground for discarding the entire ocular

testimonies on record by the learned Trial Judge appears to be that they are related to the deceased and, therefore, are interested witnesses. In doing so, the learned Trial Judge has failed to appreciate the fact that the presence of those witnesses was quite natural on the spot, moreover, those are the persons who are also injured in the course of the incident. As against this, the defence theory is that complainant Kishor made firing and in such firing his own father, mother and brothers and other witnesses got injured which appears to have found favour with the learned Trial Judge which in our view is absolutely uncalled for, especially when evidence of relative witnesses was also supported by the independent witnesses whose credibility neithr can be challenged nor in fact is shown to be doubtful. Under the circumstances, we are inclined to hold that the learned Trial Judge has utterly erred in accepting the defence theory and discarding the prosecution evidence on such count.

17. The learned counsel for the respondents submitted that, when two stories emerge from available evidence, one in favour of the defendant and the other in prosecution’s favour, the one in favour of the defence has to be accepted in order to give benefit of doubt to accused persons and, therefore, the judgment of the learned Trial Judge cannot

be faulted on that count. In this regard, we must note that, there is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adoopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less from the conviction of an innocent. In case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. In the present case, it is seen that not only admissible evidence is totally ignored by the learned Trial Judge, but so called defence theory is accepted without any foundation in support and, therefore, in our considered view, the judgment of the learned Trial Judge appears to be perverse and hence has to be set aside.

18. From the evidence on record, we are satisfied that, all the accused persons at the relevant time and place fired their guns to the deceased and injured witnesses with an intention to kill them and succeeded in killing deceased Janu and grievously hurt other witnesses with pellet injuries and, therefore, they are guilty of commission of the offence punishable under Sections 302, 307 read with 34 of the I.P.C. Needless to mention that charge under Sec. 307 read with 34 is independently established against the accused as they attempted to kill witnesses also.

The learned counsel for the appellants prayed for leniency on the ground that accused No.2 was a paralytic and offence was committed several years ago. In our view, these are not sufficient grounds for showing any leniency for offences like murder and attempt to murder.

19. Today, both the respondents i.e. respondent Nos. 2 and 3 were called before the Court in person. They were informed that they were to be convicted for the impugned offences and if they wanted to state anything about the sentence to be imposed upon them. Both the accused persons prayed that they have not committed any offence and if it is so held, leniency should be shown. The learned counsel

for the said respondents also prayed for leniency as we have made reference earlier to the said argument. Having considered all the relevant aspects in this regard, in our considered view, the sentences we propose to impose would meet the ends of justice.

20. As noted earlier, the respondents accused Nos. 1 & 4 died pending the appeal and, therefore, the appeal abated against them. Accused Nos. 2 and 3 are on bail and are required to be punished for the offence committed by them i.e. offence punishable under Sec. 302 read with 34 as well as 307 read with 34 of the I.P.C. as well as under Sec. 25(1)(a) of the Indian Arms Act. Hence the order:-

O R D E R

The appeal stands abated against respondent accused Nos. 1 & 4 as they are dead.

The judgment and order passed by the Sessions Judge, Raigad dated 11.7.1988 acquitting all the accused persons of all the charges levelled against them is hereby set aside.

Accused persons are found guilty of commission of the offence punishable under Sections 302, 307 read with 34 of the I.P.C. and under Sec.

25(1)(a) of the Indian Arms Act and accused Nos. 2 and 3 are hereby sentenced to suffer life imprisonment and to pay fine of Rs.5000/- each, in default to suffer R.I. for two months, for commission of the offence punishable under Sec. 302 read with 34 of the I.P.C. They are also convicted for commission of the offence punishable under Sec. 307 read with 34 of the I.P.C. and are sentenced to suffer R.I. for 7 years and to pay fine of Rs.5000/- each, in default to undergo sentence of R.I. for one month each for commission of the offence under Sec. 307 read with 34 of the I.P.C.

Both the substantive sentences to run concurrently.

No separate sentence is imposed for offence under Sec. 25(1)(a) of the Indian Arms Act.

The respondent accused Nos. 2 and 3 shall be entitled to set off under Sec. 428 of the Cr.P.C. of the period they had undergone imprisonment pending the trial and appeal.

Their bail bonds stand cancelled and they are hereby directed to surrender to the Sessions Judge, Raigad-Alibag within a period of eight weeks from today to undergo the sentence against them.

Consequently, revision application is allowed.

C.c. expedited.

(R.M.S. Khandeparkar, J.)

(P. V. Kakade, J.)